

Service Date: March 8, 1991

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER of the Application of	)	TRANSPORTATION DIVISION
TABISH BROTHERS DISTRIBUTORS, INC.,	)	
Missoula, Montana, for a Class C	)	DOCKET NO. T-9363
Montana Intrastate Certificate of	)	
Public Convenience and Necessity.	)	ORDER NO. 5936b

\* \* \* \* \*

PROPOSED ORDER

\* \* \* \* \*

APPEARANCES

FOR THE APPLICANT:

Michael J. Sherwood, Sherwood Law Office, 401 North Washington, P.O. Box 8142,  
Missoula, MT 59802/59807

FOR THE PROTESTANTS:

William E. O'Leary, Attorney at Law, 309 Geddis, Helena, MT 59601 and Hugh Sweeney,  
Sweeney & Doak, 2722 3 Avenue North, Billings, Montana 59101, appearing on behalf of  
Keller Transport, Inc.

Jerome Anderson, Attorney at Law, P.O. Box 866, Helena, MT 59624, appearing on behalf  
of Dixon Brothers, Inc.

William Leaphart, Leaphart Law Firm, 1 N. Last Chance Gulch, Suite, Helena, Montana  
59601, appearing on behalf of Hornoi Transport, Inc.

FOR THE COMMISSION:

Ivan C. Evilsizer, Staff Attorney, Bonnie Lorang, Assistant Administrator, Transportation Division, 2701 Prospect Avenue, Helena, MT 59620

BEFORE:

JOHN B. DRISCOLL, Commissioner and Hearing Examiner

BACKGROUND

On February 9, 1989 the Montana Public Service Commission (Commission or PSC) received an application from Tabish Brothers Distributors, Inc. (Tabish or Applicant), 955 Beech St., P.O. Box 8448, Missoula, Montana for a Class "C" intrastate Certificate of Public Convenience and Necessity. Tabish sought authority to transport gasoline; gasoline, casing heads; gasoline, natural; gasoline, N.O.S. J.P. 4 Jet Fuel; tractor fuel; naptha and solvents; jet fuel; miscellaneous bottled and compressed industrial gases, including but not limited to acetylene, oxygen, nitrogen, and nitrous oxide, between all points and places in the State of Montana.

The above described application was publicly noticed by first class mail and publication. Protests were received from H.F. Johnson, Inc., Keller Transport, Inc. (Keller), Hornoi Transport, Inc. (Hornoi) and Dixon Brothers, Inc. (Dixon).

A noticed public hearing on this matter was held May 17, 1989 in the Commission Conference Room, 2701 Prospect Avenue, Helena, Montana.

A Final Order was issued on June 12, 1989, which granted the industrial gases portion of the application and denied the petroleum products portion (by granting Protestants' Motion to Dismiss). Order No. 5936, Service Date: June 13, 1989.

On June 23, 1989 Tabish filed a Motion for Reconsideration of the Commission's ruling granting the Motion to Dismiss. The Protestants thereafter filed briefs in opposition.

After due deliberation, the Commission granted rehearing in this docket based upon the Applicant's Motion for Reconsideration. Order No. 5936a, Service Date: October 3, 1989. The Order on Reconsideration specifically limits the evidence admissible by Tabish on rehearing to that which is directly relevant to the nature of the storage capacity (i.e., "warehousing" or "incidental to transportation") and shippers' investigation or utilization of other carriers (solely with respect to their availability of storage capacity or other reasonable alternatives).

Following public notice, the rehearing was held on February 21, 1990, and continued on June 7, 1990, in the Commission Conference Room, 2701 Prospect Avenue, Helena, Montana.

#### SUMMARY OF TESTIMONY

Mr. Frank Tabish of Missoula, Montana appeared and testified in support of the application. Tabish Brothers Distributors, Inc. is a Montana corporation which began operations in 1966. Frank Tabish and his brother George Tabish are co-owners of the corporation. The Applicant has engaged in the transportation and distribution of fuel, primarily jet fuel.

The Applicant's equipment includes two Peterbilt tractors, a 7,500 gallon trailer, 9,500 gallon trailer, and a 1981 45' Fruehauf trailer. All equipment is owned free and clear.

The Applicant's business office is located on leased land in Missoula. There are a total of five employees, including the owners. The truck drivers attend an annual safety meeting

sponsored by its insurance company and all Conoco driver safety meetings. Mr. Tabish personally conducts a road test with his drivers approximately six times per year. The Applicant owns four above ground storage tanks with a total capacity of 78,000 gallons. These tanks have been used to store up to 8,000 gallons of fuel for Empire Airlines. No additional charge is assessed for storage. Mr. Tabish also testified regarding the precautions which must be taken to prevent contamination of aviation gas and jet fuel, specifically the flushing of the trailer tanks at the terminals. The Applicant does not have flushing equipment at its facility.

The Applicant presently holds an Interstate Commerce Commission permit (M.C. 153792) authorizing interstate transportation as a contract carrier. There also exists an ICC Certificate (M.C. 153792 Sub 1-C) in the name of "Frank Tabish and George Tabish d/b/a Tabish Brothers Trucking" authorizing interstate transportation of general commodities as a common carrier.

Mr. Tabish testified that since last summer, the Applicant has hauled aviation gas from Salt Lake City, Utah to Missoula for Conoco, Inc. He stated that Conoco owns the transported product and Tabish bills Conoco directly. The Applicant also currently hauls jet fuel for three customers as a private carrier.

The Commission's complete summary of the testimony presented at the hearing on May 17, 1989 can be found in Order No. 5936, Findings of Fact Nos. 4-24, which is incorporated herein by this reference.

At the hearing on February 21, 1990 the Applicant's first witness was Mr. Gary Lynn Boyle, Line Service Manager for Empire Airlines in Missoula, Montana. Mr. Boyle testified in support of the application. His duties include oversight of the fuel supply portion of Empire's business.

Mr. Boyle stated that he contacted three carriers in October, 1989 to check on the availability of Aviation Gas (AvGas) transportation from Billings to Missoula and potential for storage in Missoula. Upon calling Keller Transport, he spoke with Mr. Red Ankrum in Billings, who informed him that he would rather not make a commitment to providing storage unless Empire had a problem receiving fuel. Since it was not the fire season, Empire was not experiencing a fuel supply problem at that time. Mr. Boyle contacted Mr. Jack Zaremba at Hornoi Transport, and was informed that storage of AvGas would not be possible. Mr. Boyle also contacted Mr. Steve Burquist at Dixon Brothers, who told him that storage of AvGas would be possible if any legal and/or administrative problems could be resolved. Mr. Burquist suggested that Dixon might be able to leave a tanker truck at the Missoula Airport to provide additional storage capacity for Empire's needs.

Mr. Boyle stated that Empire has been obtaining its AvGas from the Conoco Billings refinery -- Conoco is hauling it to Missoula and Empire is paying a freight charge. Empire has experienced "shortages" in its supply of AvGas during the fire season. Last summer, Empire never actually ran out of AvGas, but its supply was as low as 600-800 gallons. Mr. Boyle also stated that Empire can use as much as 3,000 gallons of AvGas in a short period of time. Empire's need for additional storage of AvGas, expressed at the first hearing, still exists -- it would be more convenient for Empire to have extra storage available.

As a result of the AvGas "shortage" situation described by Mr. Boyle, Empire converted a 12,000 gallon "80 Octane" storage tank to AvGas use. Empire's total storage capacity for AvGas (with the converted tank) is now 24,000 gallons. At the time of the first hearing in May, 1989, Empire's total AvGas storage capacity was only 12,000 gallons. But, Empire now does not have a tank for 80 Octane fuel. Empire also has two 12,000 gallon tanks for jet fuel.

Mr. Boyle stated that Empire has a contract (including an obligation to supply AvGas) which can be terminated if Empire fails to perform.

Mr. Boyle testified that there are at least nine storage tanks (five above ground and four below ground) at the Missoula airport not owned by Empire. He stated that these tanks are operated by Empire's direct competitor, Minuteman. He said he has not asked Minuteman if Empire could use their tanks.

Mr. Boyle said that he filed an application with the Missoula Airport Director, on behalf of Empire, seeking authorization for an additional 1,000 gallon above ground tank. The Director's response was that such a tank would only be permitted for private commercial use (i.e., if Empire actually dispenses the fuel); not for "public use." On further examination, Mr. Boyle stated that the Missoula Airport authorities are urging Empire to build additional above ground storage capacity.

On cross-examination, Mr. Boyle stated that Empire has not utilized the services of Keller, Hornoi or Dixon since the hearing in May, 1989; since Conoco has been hauling the AvGas in its own trucks. He further stated that Conoco's transportation service has been "adequate," only to the extent that Empire has not run out of fuel completely. Extra storage capacity for AvGas in Missoula would alleviate the problem Empire is experiencing. Empire did not investigate the availability of other carriers during the 1989 fire season.

Mr. Boyle stated that to his knowledge, Empire has never been unable to provide the U.S. Forest Service with AvGas. Minuteman and Empire simultaneously have fuel supply contracts with the Forest Service.

Mr. Boyle also stated on cross-examination that if the Tabish storage tanks were available for Empire's use, he would take the AvGas out of Tabish's tanks as soon as his tanks would hold it. The length of storage time would vary, but he would not expect it to exceed two weeks. He would not expect to have to remove fuel from the Tabish tanks everyday.

On redirect examination, Mr. Boyle described three different tests which are conducted on AvGas before it is placed in Empire's tanks -- regardless of the origin of the fuel.

The Applicant's second witness at the rehearing was Mr. Frank X. Tabish, co-owner of Tabish Brothers Distributors, Inc. His company continues to own storage facilities in Missoula which could be used to satisfy Empire's needs. The applicant has three 15,000 gallon tanks and one 17,000 gallon tank at its Missoula facility, all above ground. When the Applicant was hauling AvGas for Empire from Salt Lake City, the Applicant's tanks were used as "buffer tanks" to make sure Empire's tanks were kept full. The Applicant usually transferred AvGas from its tanks to Empire's tanks on about a weekly basis. The Applicant's tanks were only used as "temporary" storage for Empire.

If granted the requested authority, Mr. Tabish stated that his company would be available to make deliveries for Empire anytime -- 24 hours a day. One of the Applicant's storage tanks was originally dedicated for Empire's use in 1988, and has never been contaminated. He stated that he would commit any amount of storage capacity which he has available, for Empire's needs.

Mr. Tabish testified that he is not aware of any other storage facilities in Missoula for AvGas. On cross-examination, he stated that this statement is not based on personal investigation, but on a discussion with Mr. Joe Degem, General Manager of Empire.

He stated that his company's tanks satisfy all Environmental Protection Agency requirements, including primary and secondary containment. The Applicant's tanks have also been approved by the State Fire Marshall.

On cross-examination, Mr. Tabish stated that the Applicant has obtained one new tractor since the May, 1989 hearing -- a 1990 Peterbuilt, replacing the 1984 Peterbuilt.

On further cross-examination, Mr. Tabish stated that the storage tank for Empire would likely only be dedicated to Empire's use during the fire season, and the Applicant will use the tank for other purposes the remainder of the year. He has pumps at his Missoula facility for cleaning the tanks. He anticipates that the storage for Empire would be "short-term" -- from 24 hours to one week. He would not charge Empire for the storage, even if used for the entire fire season. On redirect examination, Mr. Tabish stated that he would expect to transfer AvGas for Empire in and out of his tanks on a weekly or semi-weekly basis.

The Applicant concluded its case on rehearing on February 21, 1990. The rehearing was continued until June 7, 1990 to hear the Protestants' evidence.

On June 7, 1990 the Protestants Hornoi Transport, Inc., Keller Transport, Inc. and Dixon Bros., Inc. presented their evidence. Dixon first called Mr. Loren Knittel to testify. Mr. Knittel is a traffic manager for Dixon, employed out of the general office in Newcastle, Wyoming. Mr. Knittel has worked in the trucking industry for 18 years.

Dixon is a trucking firm, primarily engaged in the bulk commodities portion of the business in Montana, Wyoming, North and South Dakota and Minnesota. See Protestant's Exhibit No. 3. Dixon holds interstate ICC and intrastate Montana PSC authority. See Protestant's Exhibit 1 (3 pages). Dixon has Montana terminal locations in Great Falls and Billings, and satellite



terminals in Missoula, Bozeman, Helena and Glendive. Dixon has equipment capable of hauling AvGas in Montana. See Protestant's Exhibit No. 2. At the time of the hearing, two such units were stationed in Billings and one in Great Falls, dedicated to AvGas. He stated that equipment can be flushed and switched between jet fuel and AvGas. With such flushing, almost all of Dixon's equipment may be used to haul AvGas or jet fuel.

Mr. Knittel stated that Dixon has not been asked in the past 24 months to haul AvGas or jet fuel for Empire, or the Conoco refineries in Great Falls or Billings. He does not recall Dixon ever hauling a load for Conoco, since normally the purchaser is the shipper.

Dixon's current hauling capacity (AvGas) from Billings is approximately 11,500 gallons (8,500 gallons without a pup trailer). Dixon also has "key loading" access at the Billings Conoco refinery, which allows the drivers to obtain fuel 24 hours per day. Dixon is capable of receiving requests for service 24 hours per day (through an answering service during nonbusiness hours). Messages are relayed by the answering service within five minutes.

Dixon's Missoula satellite terminal is composed of a leased facility, five equipment units and a full-time sales person. Dixon is capable of hauling aviation fuel from the Missoula pipeline to Empire in Missoula.

Dixon has five power units and a trailer (not dedicated to AvGas) at its Missoula facility. Dixon also has fuel storage (for its own trucks) in Missoula.

Mr. Knittel testified that Dixon could deliver AvGas from Billings to Missoula in a typical time period of nine to twelve hours. Dixon is ready, willing and able to transport AvGas from Billings to Missoula and Jet Fuel from the Missoula pipeline to Empire.

On cross-examination, Mr. Knittel stated that two of the three trailer units Dixon has based in Billings are now dedicated for jet fuel and would have to be flushed (not steam cleaned) before hauling AvGas. The other unit is not dedicated. Units must be steam cleaned before being switched from motor fuel to aviation fuel service. Steam cleaning at the Fruehauf facility in Billings takes three to four hours. The facility is not open 24 hours. The Conoco refinery in Billings does not have flushing facilities. Mr. Knittel's previous estimate of 9 to 12 hours for a delivery from Billings to Missoula was based upon availability of a unit dedicated to AvGas (without a need for flushing or steam cleaning). If cleaning is needed and the Fruehauf facility is not open, the delivery time could be as long as 24 hours.

Even with "key-loading" access, a Conoco employee must inspect a unit to make sure it is dedicated, or was properly cleaned.

Dixon has intrastate 800 (toll-free) telephone numbers at their Great Falls and Billings facilities, available for Montana customers; and an interstate 800 number to the Newcastle, Wyoming office.

Dixon has a 4,100 cubic foot tank vessel for storing dry bulk products, primarily used on construction sites. The term of such storage is typically less than 24 hours.

Hornoi Transport, Inc. presented its evidence next, calling Mr. Jack Zaremba to testify. Mr. Zaremba is the Operations Manager for Hornoi. Hornoi is a Montana corporation, wholly owned by Farmer's Union Central Exchange dba Cenex. Mr. Zaremba supervises Hornoi's operations in Montana, western North Dakota, Wyoming and part of Idaho. Hornoi has Montana intrastate petroleum and ICC general commodity authority. See Protestant's Exhibit Nos. 4 and 5. Hornoi has terminals in Billings/Laurel, Glendive, Bozeman, Great Falls and a one-truck terminal

in Polson. Hornoi has fax machines at all its locations and toll-free numbers at Bozeman, Billings, Glendive and Laurel.

Hornoi has approximately 20 trailer units capable of hauling AvGas. See Protestant's Exhibit No. 6. Ten units are currently dedicated to hauling aviation fuel, with two or three more soon to be leased. Hornoi's Laurel facility is capable of steam cleaning trailers. Its mechanics are available on an "on-call" basis and the cleaning takes about two hours.

Hornoi is capable and willing to haul AvGas from Billings to Missoula, and could dedicate or acquire additional units to serve excess demand, if needed.

In response to a letter from Empire regarding AvGas storage in Missoula, Hornoi responded that it did not have any storage capacity in the Missoula area. Applicant's Exhibit Nos. 22 and 23. Mr. Zaremba testified that a trailer parked temporarily at Empire's place of business would not comply with state fire regulations.

Hornoi has seven trailer units in Billings capable of hauling AvGas, but all are currently hauling jet fuel.

Keller Transport, Inc. (Keller) called Mr. Harold Ankrum to testify. Mr. Ankrum has worked in the trucking business 40 years and is the current President of Keller. Keller has general commodity interstate authority and Montana intrastate petroleum authority. See Protestant's Exhibit No. 7. Keller has terminals in Glendive, Billings, Great Falls, Bozeman, Helena, Missoula and Kalispell. Keller has a satisfactory safety rating from the U.S. Department of Transportation.

Keller has approximately 30 trailer units in Montana capable of hauling AvGas. Ten of those units are currently dedicated. See Protestant's Exhibit No. 8. Trailer units must be steam cleaned and flushed before hauling AvGas, after hauling diesel or other fuels. The additives in motor fuels adhere to the trailer's interior walls and would contaminate aviation fuels unless steam cleaned. Steam cleaning at the Freuhauf facility in Billings costs about \$175 per trailer, \$225 for a full size trailer and pup trailer. The Freuhauf facility in Billings is the only location where Keller can get its trailers steam cleaned. The Exxon refinery does not charge for flushing. Conoco does not have a flushing facility (sump).

Keller is currently hauling turbo fuel for Empire from the Missoula pipeline to the Empire terminal. Keller's service appears to be satisfactory.

A haul from Missoula to Billings and back to Missoula would take Keller about 24 hours with one man on the truck. Keller is ready, willing and able to haul AvGas for Empire from the Conoco Billings refinery to the Missoula airport.

#### ANALYSIS AND DECISION

In considering applications for a motor carrier Certificate of Public Convenience and Necessity, the PSC is governed by the provisions of < 69-12-323(2)(a), MCA, which provides as follows:

(2)(a) If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefor shall be issued. In determining whether a certificate should be issued, the

commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby. § 69-12-323(2)(a), MCA.

The Commission traditionally undertakes the following analysis to determine if a certificate should be granted. First, is the applicant fit, willing and able to provide the service? Determination of fitness requires analysis of the following factors: 1) financial condition, 2) experience, 3) adequacy of equipment, 4) intention to perform the service sought, and 5) past illegal operations. If the applicant is found to be fit, the Commission must determine if the public convenience and necessity require that the authority be granted. This is usually a three step analysis:

- 1) Whether the proposed new operation will serve a useful public purpose, responsive to a public demand or need;
  - 2) Whether the purpose can and will be served as well by existing lines of carriers; and
  - 3) Whether the new operation or service will endanger or impair the operations of existing carriers contrary to the public interest.
- Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936).

In the context of the above, the public policy of the state to maintain and encourage a system of common carrier motor transportation must also be considered. § 69-12-202, MCA.

The parties' briefs acknowledge that the scope of the application (on rehearing) must be limited to the transportation of aviation gasoline from the Continental Refinery at Billings, Montana to Empire Aviation at the Missoula International Airport located west of Missoula, Montana. Based upon the evidence presented at the hearings herein, the Commission agrees.

At the hearing on February 21, 1990 Applicant moved for admission of the Missoula International Airport Rules and Regulations. Protestants objected on the grounds of hearsay. The Applicant provided said Rules with its brief of August 3, 1990. The Commission hereby overrules the objection and takes administrative notice of said Rules pursuant to Rule 202, Montana Rules of Evidence.

On June 7, 1990 Applicant moved to Dismiss Protestant H.F. Johnson from this case on the grounds that it failed to make an appearance at the hearing. H.F. Johnson also failed to make an appearance at the hearing on February 21, 1990. However, H.F. Johnson made an appearance through counsel at the initial hearing on May 17, 1989. In addition, H.F. Johnson duly filed a protest when this matter was initially noticed to the public. Applicant's motion to dismiss H.F. Johnson is denied.

On June 7, 1990 Applicant objected to a line of questioning concerning dedicated equipment allegedly provided by Conoco, based upon conversations between Conoco employees and Dixon Brothers employee Steve Berquist (June 7, 1990 Transcript, pp. 25-27). This is a case of multiple hearsay statements made by Conoco employees to Steve Berquist and then conveyed to Loren Knittel. An exception to the hearsay rule for each statement must be established before the testimony can be admitted. Rule 805, Montana Rules of Evidence. Protestants argued that the statement was obtained in the normal course of business and that such testimony has been allowed "in the general course of motor carrier proceedings of this type." Protestants arguments are unpersuasive. The statements in issue were oral in nature and therefore the business records exception does not apply. Rule 803(6), Montana Rules of Evidence. No other exception to the hearsay rule applies either, so Applicant's objection is sustained. The Commission hereby strikes

the answers given by Mr. Knittel to the questions concerning Conoco's use of dedicated equipment (June 7, 1990 Transcript, pp. 25-28).

At the conclusion of Applicant's case on February 21, 1990, the Protestant's moved to dismiss the application on the following grounds:

- a. Failure to prove public convenience and necessity;
- b. The shippers have merely stated a "preference" for the services of the Applicant, which is insufficient to establish public convenience and necessity;
- c. The shippers have acknowledged that they have not used the services of at least three of the Protestants, and it is ordinarily required that other carrier's services be used and found wanting; and further, the shippers have failed to investigate the availability of Protestants' services;
- d. The granting of a Class "C" petroleum products Certificate could undermine the traditional Class "B" petroleum products common carriage system.
- e. The Applicant has failed to present technical shipper testimony establishing that a shipper actually paid for the transportation services.
- f. The storage service provided by applicant would constitute "warehousing," and therefore cannot be considered in determining Public Convenience and Necessity.

Based upon all of the evidence presented by Applicant in its case in chief at the hearings on May 17, 1989 and February 21, 1990 the Commission finds that a prima facie showing of public need (the first part of the Pan American test) has been established by the Applicant. In

addition, the Applicant is found to be fit, willing and able to provide the proposed service. Therefore, Protestants' motion to dismiss is denied.

The next step in the Commission's consideration is analysis of the first two parts of the Pan American test in combination, given the testimony presented by both the Applicant and Protestants. That is, whether the Applicant will serve a useful public purpose, responsive to public demand or need, which cannot be served as well by existing carriers. It is here that the Applicant has failed to meet its burden of proof.

Empire Airlines, the primary shipper in this case presented very little evidence of efforts to utilize the services of existing common carriers. See Order No. 5936, FOF 21 and 24 and February 21, 1990 Transcript, pp. 48-52, 58-59, 61. In fact, based upon the evidence in the record, Empire Airlines has never utilized the services of intrastate common carriers to haul Aviation Gas.

Applicant's case rests solely upon the alleged need for excess storage capacity for Aviation Gas during the fire season, which the existing carriers cannot provide. The rehearing in this matter was held for the express purpose of receiving evidence on the nature of the proposed storage service, to determine whether it should be considered as a component of "public convenience and necessity." Order No. 5936a. The Commission concludes that it is not necessary to rule upon whether the storage in question is "warehousing" or "incidental," since the Applicant in either case fails to satisfy its burden of proof herein. That is, even if the storage capacity is taken into account, the Applicant has failed to establish a public need which cannot be served satisfactorily by existing carriers. Empire Airlines has never actually run out of AvGas. Empire has converted a 12,000



gallon storage tank from 80 octane to AvGas (100 Octane) use. Empire has a total of four 12,000 gallon storage tanks, two are currently used for AvGas and two for jet fuel. In addition, Empire can store additional AvGas (approximately 3,500 to 3,700 gallons) in its ground tank vehicles. The Minuteman facility at the Missoula Airport has nine or ten fuel storage tanks. Minuteman also has contracts to provide fuel for the fire bombers. Empire also failed to investigate the availability of other storage capacity in the Missoula area.

The Protestants demonstrated that they are ready, willing and able to provide transportation service for Empire. Although no Protestant could provide storage service, Dixon could transport a load of AvGas from Billings to Missoula in 9 to 12 hours and Hornoi in 10 hours or less. Dixon and Keller have units stationed or located in Billings capable of hauling AvGas for Empire. Hornoi also has units in Montana available to haul AvGas, with a terminal in Billings. Hornoi also has a steam cleaning facility in Laurel. The Protestants have never been given the opportunity to haul AvGas from Billings for Empire. In summary, the Protestants have established that they have the equipment, experience and ability to haul AvGas from Billings for Empire in approximately 9 to 12 hours; and the Applicant has failed to demonstrate that his needs would not be adequately served by the services offered by the Protestants.

The Applicant's argument is primarily based upon a "peak" need or demand Empire may experience during a busy forest fire season. The Commission has previously noted that peak period demand is not sufficient to warrant a grant of motor carrier authority. In the Matter of the Application of Matlack, Inc., MPSC Docket No. T-7348, Order No. 5008, Findings of Fact Nos. 43-44, see also § 69-12-323(2)(a), MCA. This holding is consistent with previous holdings of the

Interstate Commerce Commission, e.g., Petroleum Transit Co., Inc., 15 FCC § 35,319 (1961), Lester C. Newton, 9 FCC § 32,703 (1953). The Commission finds the reasoning of these cases applicable to the instant application. An occasional need which may arise during a peak fire season is insufficient proof of public convenience and necessity.

Although the Commission holds that the potential peak demand in this case is insufficient to grant the instant application, it is also sensitive to the reality that fighting forest fires is an important public interest and the potential dangers to life, property, and the environment are enormous. During a peak fire season, the temporary operating authority provisions of the Montana Motor Carrier Act and the Commission's administrative rules are available to the Applicant (and others) to request authority to serve an "immediate and urgent" public need. § 69-12-207, MCA, and ARM 38.3.501 through 38.3.506. All such applications are processed and considered promptly by the Commission.

The Applicant also argues that Empire's "distinct needs" justifies granting the application, citing I.C.C. v. J-T Transport Co., 368 U.S. 81 (1961) and other cases. The Commission finds the Protestants' rebuttal of this argument to be persuasive. First, the "distinct needs" test cited in the I.C.C. and Federal contract carrier cases directly arises from the applicable Federal statute. 49 U.S.C. § 10102(15) [formerly 49 U.S.C. § 303(a)(15)]<sup>5</sup>, see Global Van Lines, Inc. v. I.C.C., 704 F.2d 829, 830, footnote 1 (1983). There is no similar Montana statute which establishes "distinct needs" as a specific consideration for public convenience and necessity. The Protestants' point that the burden of proof in Federal contract carrier cases is different than in Montana is also well taken.

This is not to say that the Commission may properly consider a shipper's needs, "distinct" or otherwise, in the general context of the Pan American test. However, the cases cited by the Applicant are not binding upon this Commission, nor are they particularly applicable to the facts of the instant case. Most significantly, though, the Applicant has failed to establish that his needs (whether characterized as "distinct" or not) cannot be met adequately by the services of existing carriers.

#### CONCLUSIONS OF LAW

The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter. § 69-12-322, MCA.

In hearing this application, the Commission has given due consideration to the transportation service being furnished by other existing transportation agencies, the likelihood of the proposed service being permanent and continuous throughout 12 months of the year, and the effects upon other transportation services. § 69-12-323, MCA.

An applicant for a certificate must demonstrate that public convenience and necessity require authorization of the proposed service, Section 69-12-323, MCA. Public convenience and necessity is established where there is a public need for service, where existing carriers cannot fill the demonstrated need, and where the proposed service will not endanger or impair existing carriers contrary to public interest. Pan American Bus Lines Operation, 1 M.C.C. 1901 (1936). The

Applicant has failed to establish public convenience and necessity, by failing to prove that a public need exists which cannot be served as well by existing carriers.

ORDER

NOW THEREFORE IT IS ORDERED that the application for authority to transport aviation gasoline from the Continental Refinery at Billings, Montana to Empire Aviation at the Missoula International Airport located west of Missoula, Montana in Docket No. T-9363 is hereby DENIED.

DONE AND DATED this 5th day of March, 1991.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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JOHN B. DRISCOLL, Commissioner &  
Hearing Examiner

ATTEST:

Ann Peck  
Commission Secretary

(SEAL)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the PSC prior to Final Order. See, Section 2-4-621, MCA. Exceptions and briefs must be filed within 20 days of the service date of this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. See, ARM 38.2.4803 and 38.2.4804.